



United States Department of the Interior

FISH AND WILDLIFE SERVICE

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In Reply Refer To:
FWS/Region 5/ES-TE

MAY - 1 2010

Memorandum

To: Regional Director

From: Assistant Regional Director - Ecological Services

Subject: Findings: The Nature Conservancy Safe Harbor Agreement for Karner Blue Butterflies in Eastern New York

The U.S. Fish and Wildlife Service's (Service) New York Field Office has worked with The Nature Conservancy, Eastern New York Chapter (TNC), and the New York State Department of Environmental Conservation (NYSDEC) to develop a Safe Harbor Agreement (SHA) and associated documents for the federally listed and State-listed endangered Karner blue butterfly (*Lycaides melissa samuelis*). The New York Field Office finds that TNC's application for an Enhancement of Survival Permit (ESP) authorizing implementation of the SHA meets the regulatory and statutory standards, and offers the following Set of Findings which recommends issuance of the ESP. The SHA, Environmental Assessment (EA), and biological opinion were reviewed by Service personnel at the Regional Office who concur with issuance of the ESP.

I. DESCRIPTION OF PROPOSAL

TNC has submitted an application for an ESP to administer a safe harbor program in the Karner blue butterfly Glacial Lake Albany (GLA) recovery unit for a period of 30 years. The GLA recovery unit is located in portions of Albany, Saratoga, Schenectady, and Warren Counties, New York. Issuance of the ESP necessitates Service approval of the SHA with TNC and the NYSDEC. The purpose of the SHA is to promote the conservation of the Karner blue butterfly by encouraging restoration, creation, enhancement, and management of their habitat on non-Federal and non-TNC land. Under the auspices of State law, the SHA will accomplish the same goals and provide similar benefits to the State-listed endangered Persius duskywing (*Erynnis persius*) and State-threatened frosted elfin (*Callophrys irus*) butterflies.

Under the SHA, TNC will hold the ESP and sign binding contracts memorialized as cooperative agreements with landowners who voluntarily allow implementation of conservation measures to benefit the Karner blue butterfly. In return, these property owners receive regulatory assurances

that the Service will allow the "incidental take" of Karner blue butterflies associated with their implementation of specified management activities and/or their lawful use of the enrolled property after the management activities have been initiated. The cooperating agency, NYSDEC, is also expected to sign the SHA thereby allowing the incidental take of State-listed Karner blue butterflies, as well as the State-threatened frosted elfin and State-endangered Persius duskywing butterflies consistent with New York State rules and regulations. The NYSDEC will also provide technical expertise to assist with implementation of the provisions of the SHA.

Prior to executing each cooperative agreement, TNC or their designated agents (currently, Albany Pine Bush Preserve Commission and Wilton Wildlife Preserve and Park) will perform surveys to determine baseline habitat conditions on the landowner's property. In accordance with methods prescribed in SHA Appendix B, properties containing suitable habitat may be deemed occupied because they are in close proximity to sites known to be occupied by one or more of the three butterfly species, or they may be surveyed to determine the presence, and potentially the abundance, of Karner blue and frosted elfin butterflies. Given the difficult nature of identifying Persius duskywing, for the purposes of establishing baseline conditions, we will assume that Persius duskywing may be present at sites with documentation of Karner blue and/or frosted elfin butterflies. Baseline conditions for most properties are expected to be zero. Landowners, also referenced as "cooperators", may then sign cooperative agreements (template provided in SHA Appendix A) with TNC that will: (1) include a map of the property delineating any existing occupied habitat and suitable unoccupied habitat; (2) describe proposed habitat improvements; (3) provide TNC or its designees with access to the property to assess habitat conditions and to monitor and/or mark butterflies; and (4) specify the duration of the agreement, up to but not exceeding the life of the ESP. In many cases, the cooperative agreement will also authorize TNC, with Service and NYSDEC concurrence, to translocate Karner blue butterflies, frosted elfins, or Persius duskywing to or from the cooperator's property.

It is anticipated that most management activities to improve or maintain Karner blue butterfly habitat conditions on lands enrolled under this SHA will be implemented by TNC or their designated agents. TNC already receives authorization to conduct such activities via a subpermit issued by NYSDEC under the provision E.12 of Service permit number TE838253-6 dated May 15, 2007. However, in some cases, the cooperative agreement may provide for habitat management activities to be directly implemented by the landowner. Requisite conservation measures for any landowner-implemented management will be specified, where applicable, in the cooperative agreement.

Participating landowners who enter into legally-binding cooperative agreements with TNC, as well as their successors who choose to become parties, will be included within the scope of the ESP by Certificates of Inclusion. In order to give assurance that the voluntary habitat improvements made by the landowners do not restrict present and subsequent owners, the permit issued to TNC will authorize incidental taking of Karner blue butterflies by landowners covered

by a Certificate of Inclusion for a period of 30 years, or more if extended, regardless of the term of the landowner's cooperative agreement.

As long as the cooperating landowner carries out the agreed-upon habitat improvements and maintains his or her environmental baseline responsibilities, if any, on the property over the life of the agreement, he or she may eventually develop, modify vegetation management, or make any other lawful use of the property, even if such use incidentally results in the loss of Karner blue butterflies or their habitat. There are three limitations on this right. First, the cooperator may not capture, collect, or deliberately kill or injure Karner blue butterflies. Second, off-trail motorized vehicle use and construction within butterfly habitat are proscribed during the life of the agreement. Third, except in emergency situations, a participating landowner who plans to carry out an action likely to result in an incidental taking of Karner blue butterflies, either after the expiration of the cooperative agreement or if the landowner exercises the right to early termination of the agreement for reasons outside his or her control, must give TNC a minimum 60-day advance notice and an opportunity to translocate the butterflies if TNC, the NYSDEC, and Service so choose.

Should either the frosted elfin or Persius duskywing be listed under the ESA in the future, TNC may request an amendment to the SHA and ESP to include the newly listed species, including any baseline conditions established under prior agreements with cooperating landowners. Documentation of surveys and baseline conditions for frosted elfin and Persius duskywing, as specified in SHA Appendix B, will be incorporated into landowner agreements under the terms of the NYSDEC permit to be issued to TNC in accordance with section 182.4 of Title 6 of the New York Code of Rules and Regulations. Habitat management activities for frosted elfin and Persius duskywing are the same as those described for Karner blue butterflies.

II. ENHANCEMENT OF SURVIVAL PERMIT ISSUANCE CRITERIA - ANALYSIS AND FINDINGS

1. *Any taking will be incidental to an otherwise lawful activity and in accordance with terms of the SHA.*

The Service finds that the proposed taking of Karner blue butterflies will be incidental to the otherwise lawful activities that would occur as a result of conducting Karner blue butterfly habitat management activities or return of the enrolled properties to baseline conditions after termination of a landowner agreement. As noted in the proposal description above, agreements with landowners will explicitly proscribe capturing, collecting, or deliberately killing or injuring Karner blue butterflies.

2. *Implementation of the SHA is reasonably expected to provide a net conservation benefit to the Karner blue butterfly by contributing to its recovery and the SHA otherwise complies with the Safe Harbor policy.*

Restoration, enhancement, and maintenance of suitable habitat conditions on private lands voluntarily enrolled under the SHA will expand the Karner blue habitat base and populations in the GLA and improve connectivity among populations. These benefits will persist for at least the duration of the landowner agreements. Without the assurances furnished by the SHA, many of the potential cooperator's properties would not otherwise be used by this species. These benefits are especially valuable because they address a major threat to Karner blue butterflies in the GLA – loss and fragmentation of suitable habitat.

Once butterflies are repatriated to enrolled lands via translocations or by natural expansion from nearby occurrences, management activities required to maintain suitable habitat may result in some incidental take of individual butterflies (egg, larvae, pupae, or adult) or temporary short-term degradation of habitat. Specific conservation measures will be implemented to reduce take associated with habitat management. An expanded habitat base and increased populations facilitated by these management activities on lands enrolled under the SHA are fundamental to increasing the overall demographic security of this disturbance-dependent species. The increased distribution of butterfly populations is also anticipated to decrease the likelihood that management activities in any one area will impact many individual butterflies. Overall benefits of restoring and maintaining suitable Karner blue butterfly habitat conditions far outweigh the adverse effects.

Although the SHA and associated agreements preserve the landowner's right to return the habitat to baseline conditions upon termination of the agreement, the species will be no worse off as a result of the SHA than it would have been without it. Furthermore, even temporary expansion of Karner blue butterfly habitat and range in the GLA will provide a conservation benefit to the species by: (1) providing supplemental habitat for existing populations for at minimum the duration of the agreement; (2) increasing potential for genetic exchange among otherwise isolated populations; and (3) affording additional opportunities to learn about Karner blue butterfly reintroduction and dispersal. Furthermore, it is unlikely, but not impossible, that all enrolled properties will be simultaneously returned to baseline, and it is plausible that some properties will be maintained as suitable and occupied habitat after expiration of the SHA. In a worst-case scenario, the program will have provided interim benefits in the form of habitat augmentation and range expansion during its duration while other efforts by the Service, NYSDEC, TNC, and partners increase protected Karner blue butterfly habitat permanently in the GLA.

3. *The probable direct and indirect effects of authorized take will not appreciably reduce the likelihood of the survival and recovery of Karner blue butterfly in the wild.*

The Endangered Species Act's (ESA) legislative history establishes the intent of Congress that this issuance criteria be identical to a regulatory finding of no "jeopardy" under section 7(a)(2) (see 50 CFR §402.03). Therefore, issuance of this section 10(a)(1)(A) ESP was reviewed by the Service under section 7 of the ESA. In the biological opinion, which is attached hereto and

incorporated herein by reference, the Service concluded that issuance of the ESP is not likely to jeopardize the continued existence of the Karner blue butterfly.

4. *Implementation of the terms of the SHA is consistent with applicable Federal, State, and Tribal laws and regulations.*

In addition to compliance with section 7 of the ESA as described under criterion 3 above, a Finding of No Significant Impact documents compliance with the National Environmental Policy Act.

Procedures for compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470) and Section 14.09 of the New York State Historic Preservation Act of 1980, described in Appendix B of the EA, will be incorporated in the ESP.

The SHA also complies with New York State's endangered species law, NYS-ECL § 11-0535, and regulations, 6 NYCRR § 182, and the NYSDEC will be a signatory to the SHA.

5. *Implementation of the terms of the SHA will not be in conflict with any ongoing Karner blue butterfly conservation or recovery program.*

The SHA is completely consistent with the recovery strategy provided in the 2003 Karner blue butterfly recovery plan and ongoing recovery efforts. Recovery plan task 1.43 specifically identifies Safe Harbor Agreements as a tool to encourage private landowner participation in Karner blue butterfly conservation and recovery. Other tasks that will be served by the proposed action include 1.23 (continue/start management activities for New York), 2.213 (initiate/continue reintroductions and accelerated colonization in New York), and 4.3 (encourage private landowners to conserve the Karner blue butterfly).

6. *The applicant has shown capability for and commitment to implementing all the terms of the SHA.*

TNC has been managing Karner blue butterfly habitat in the GLA since before the species' ESA listing. They also have a long history of successful efforts to work with private landowners on behalf of this and other sensitive species.

III. PERMIT CONDITIONS

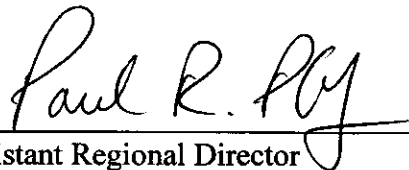
The SHA includes all permit conditions necessary or appropriate to carry out the purposes of the permit as specified in 50 CFR 17.22(c)(3), including required notifications of transfer of lands, advanced notification of intent to incidentally take Karner blue butterflies, and opportunities for the Service to relocate affected butterflies.

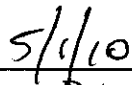
IV. PUBLIC COMMENTS

A public comment period on a draft version of the SHA and EA was announced in the *Federal Register* on October 10, 2007. Two responses were received. One commenter expressed opposition to the proposed action based on generalized antipathy for The Nature Conservancy. The second commenter offered suggestions regarding survey guidelines in the draft SHA that were considered and incorporated, in part, into the final SHA.

V. RECOMMENDATIONS ON ISSUANCE OF PERMIT

Based on our findings with respect to the SHA, the EA, and the biological opinion, the issuance of the 10(a)(1)(A) ESP to TNC is recommended.


Assistant Regional Director
Ecological Services


Date

Concur:

Acting


Regional Director


Date

Attachments